Duquesne Law Review

Volume 18 | Number 2 Article 7

1980

Constitutional Law - Sixty Amendment - Indigent Criminal Defendants - Right to Assigned Counsel - Misdemeanors

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Recent Decisions

CONSTITUTIONAL LAW—SIXTH AMENDMENT—INDIGENT CRIMINAL DEFENDANTS—RIGHT TO ASSIGNED COUNSEL—MISDEMEANORS—The United States Supreme Court has held that the sixth and fourteenth amendments do not require a state to provide counsel for an indigent defendant charged with a crime for which imprisonment upon conviction is authorized but not imposed.

Scott v. Illinois, 99 S. Ct. 1158 (1979).

On January 31, 1972, Aubrey Scott, an indigent,[1] appeared *pro se* before an Illinois trial court on a charge of theft for shoplifting.[2] The applicable Illinois statute[3] provided for a maximum penalty of a $500 fine or one year in jail, or both. The court proceeding began as a preliminary hearing, but when Scott indicated to the court that he was then ready for trial, the court ordered him arraigned and he pleaded not guilty. Although Scott was advised of his right to a jury trial, he consented to a bench trial. His immediate trial resulted in conviction and a sentence to pay a $50 fine. At no time during the entire proceeding was Scott advised of a right to be represented by counsel, and to have counsel appointed if he was indigent.[4]

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1. The question of Scott's indigence was not raised during the trial court proceeding. After conviction, his status as an indigent was established, resulting in the appointment of counsel and the provision of a free transcript of his trial for use on appeal. Scott's indigent status at the time of his trial was assumed by the parties and the Illinois courts for purposes of this case. Scott v. Illinois, 99 S. Ct. 1158, 1163 n.1 (1979).

2. Scott was charged with the theft of a sample case and address book totaling $13.68 from F.W. Woolworth. *See* Brief for Petitioner at 4, Scott v. Illinois, 99 S. Ct. 1158 (1979).

3. ILL. REV. STAT. ch. 38, § 16-1(a)(1) (1969). The penalty provision of the statute reads in relevant part:

> A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. A person convicted of such theft a second or subsequent time, or after a prior conviction of any type of theft, shall be imprisoned in the penitentiary from one to 5 years.

Id. See 99 S. Ct. at 1159 n.2.

4. *See* Brief for Petitioner at 5. Scott also alleged that because he had been deprived of the assistance of counsel at trial, the benefit of the other sixth amendment rights to which he was entitled had been lost. *Id.* at 19. *See* Henderson v. Morgan, 426 U.S. 637 (1976) (right to be informed of the nature and cause of the accusation); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process of witnesses); Pointer v. Texas, 380 U.S. 400 (1965) (right to confrontation); Smith v. O'Grady, 312 U.S. 329 (1941) (right to be advised of the elements of and the penalty for the offense being charged).

Before an Illinois appellate court, Scott contended that under the rule of *Argersinger v. Hamlin*,[5] the sixth amendment[6] guaranteed him the right to appointed counsel, even though he was only punished by a fine, because the offense for which he was tried carried a potential penalty of incarceration.[7] *Argersinger* held that irrespective of the denomination of a crime, no person could be imprisoned unless counsel had been either appointed or properly waived.[8] Alternatively, Scott argued that if *Argersinger* did not apply, its rule should be extended to cover the trial of a person charged with a misdemeanor-theft since such trials were "criminal prosecutions" within the intendment of the sixth amendment.[9] The court determined that the sixth amendment right to counsel extended only to those misdemeanants who are in fact imprisoned, but did not guarantee appointed counsel to misdemeanor defendants who, like Scott, do not suffer an actual loss of liberty.[10] After the Supreme Court of Illinois affirmed the appellate court's decision,[11] the United States Supreme Court granted certiorari[12] to resolve a conflict among state and lower federal courts regarding the proper application of *Argersinger*.[13]

Justice Rehnquist, writing the majority opinion,[14] rejected Scott's

5. 407 U.S. 25 (1972). In *Argersinger*, the Court decided whether the sixth amendment right to the assistance of counsel depended upon the seriousness of the particular criminal prosecution. This possibility was raised by the Court's decision in Duncan v. Louisiana, 391 U.S. 145 (1968), which held that a criminal defendant had no right to jury trial unless charged with a crime carrying an authorized penalty of imprisonment in excess of six months. The State of Florida argued in *Argersinger* that the right to appointed counsel should not be broader than the right to a jury trial, but conceded that where the right to jury trial for serious offenses existed, the right to appointed counsel should also be recognized. The *Argersinger* Court rejected the notion that the serious offense limitation defined the scope of a criminal defendant's right to counsel, and did not distinguish between serious and non-serious misdemeanors in applying the rule that without a knowing and intelligent waiver, no defendant could be imprisoned unless he was represented by counsel at trial. *See* 407 U.S. at 37.

6. The sixth amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

7. *See* note 3 *supra*.

8. *See* note 5 *supra*.

9. Scott v. Illinois, 99 S. Ct. 1158, 1160 (1979).

10. People v. Scott, 36 Ill. App. 3d 304, 343 N.E.2d 517 (1976).

11. People v. Scott, 68 Ill. 2d 269, 369 N.E.2d 881 (1977).

12. 98 S. Ct. 2817 (1978).

13. Scott v. Illinois, 99 S. Ct. 1158, 1159 & n.1 (1979). After *Argersinger*, the controversy centered upon whether the lack of counsel vitiated the conviction itself, or simply rendered any sentence of imprisonment unconstitutional. *See also* notes 85-88 and accompanying text *infra*.

14. Chief Justice Burger and Justices Stewart, White, and Powell joined the majority opinion. Justice Powell filed a concurring opinion. Justice Brennan, joined by Justices Marshall and Stevens, filed a dissenting opinion. Justice Blackmun also filed a dissenting opinion.

argument that *Argersinger* had left open the question of the unimprisoned misdemeanant's right to counsel.[15] The Court pointed out that the explicit purpose of *Argersinger* had been to prevent the states from incarcerating uncounseled indigents. However, this was to occur without disturbing the way in which the majority of misdemeanor cases were handled.[16] Furthermore, the Constitution did not require state courts to appoint counsel to indigent defendants simply because they were charged with a statutory offense for which imprisonment was an authorized penalty.[17] The Court noted that as contemplated by the Framers of the Bill of Rights, the sixth amendment guaranteed only that an accused had the right in a criminal prosecution in a federal court to employ a lawyer to assist in his defense.[18] Eventually, the individual states had voluntarily adopted the practice of appointing counsel to defend indigent criminal defendants under certain circumstances. Although state practice differed in the types of cases in which counsel was supplied, this general endorsement of some policy of assigning counsel persuaded the Court in *Powell v. Alabama*[19] that the right to appointed counsel was fundamental and essential to the fair trial of capital cases.[20]

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15. 99 S. Ct. at 1162. The majority did not respond to Scott's arguments that even if a misdemeanor-theft prosecution was not a "criminal prosecution" within the intendment of the sixth amendment, he still had the right to appointed counsel under the due process clause, or alternatively, under the equal protection clause of the fourteenth amendment. Scott contended that given the adversary climate of the criminal system, it was a denial of due process to conduct a misdemeanor trial without the presence of defense counsel. *See* Brief for Petitioner at 22-29. He further maintained that due process pertains not only to life and liberty, but to property rights as well. Since a misdemeanor-theft conviction subjected him to stigma, fine, and forfeiture of licenses and employment, Scott argued that no distinction should be made between felonies and misdemeanors with respect to the necessity of counsel to ensure a fair and accurate trial. *Id.* at 42-47.

In his equal protection argument, Scott claimed that appointed counsel was required to ensure indigents an adequate opportunity to present their claims fairly within the adversary system. *See* Ross v. Moffit, 417 U.S. 600, 612 (1974); Mayer v. City of Chicago, 404 U.S. 189, 197 (1971); Griffin v. Illinois, 351 U.S. 12, 18-19 (1956). *See also* Petitioner's Brief at 47-50.

16. 99 S. Ct. at 1160. Justice Douglas, speaking for the majority in *Argersinger*, stated: "The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary where one's liberty is in jeopardy." 407 U.S. at 40.

17. 99 S. Ct. at 1160.

18. *Id. See* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 27-30 (1955) [hereinafter cited as BEANEY].

19. 287 U.S. 45, 73 (1932).

20. 99 S. Ct. at 1160-61. The *Powell* Court did not create an absolute right to counsel in capital cases, but focused on both the capital nature of the offense and the special disadvantages of the defendant. 287 U.S. at 71. Through dicta in subsequent non-capital cases, the *Powell* rule was broadly interpreted so that the assistance of counsel became

The Court then traced the evolution of the right to appointed counsel to the imprisonment standard ultimately articulated in *Argersinger*.[21] Justice Rehnquist noted that the right to appointed counsel had developed without resort to the "serious offense" standard used to delimit the sixth amendment right to jury trial in state courts.[22] Because the serious offense limitation is peculiar to the jury trial right, the Court repeated the position previously taken in *Argersinger* that the serious offense standard should not be used to shape the contours of the right to appointed counsel.[23] The Court reasoned that constitutional line drawing increased in difficulty as the reach of the Constitution extended, and emphasized that the process of incorporation is not aided by transposing limits from one area of sixth amendment jurisprudence to another.[24] The Court explained that differences between federal and state law enforcement systems called for a less rigid application of the federal constitutional principle to the states, particularly since the range of human conduct regulated by state criminal laws is much broader than that regulated by federal criminal laws.[25] This is especially true in the area of conduct regulated by the states under the label of "petty offenses." If the sixth amendment right to appointed counsel were extended to encompass the legion of petty of-

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presumptively necessary when the case involved a capital crime. *See* Quicksall v. Michigan, 339 U.S. 660 (1950); Uveges v. Pennsylvania, 335 U.S. 437 (1948); Wade v. Mayo, 334 U.S. 672 (1948); Bute v. Illinois, 333 U.S. 640 (1948). Finally, in Gideon v. Wainwright, 372 U.S. 335, 350 (1963), the Court expressly recognized the holding of Hamilton v. Alabama, 368 U.S. 52 (1961), as having settled the right to appointed counsel in all capital cases.

21. In Betts v. Brady, 316 U.S. 455 (1942), the Court put forth the "special circumstances" rule to determine when counsel must be assigned in non-capital cases. In applying this rule, the discretion of the trial court was to be guided by notions of fundamental fairness. The Court in Gideon v. Wainwright, 372 U.S. 335 (1963), later discarded the *Betts* rule in favor of a categorical requirement that counsel be provided to all indigent defendants charged with felonies. The last extension, in Argersinger v. Hamlin, 407 U.S. 25 (1972), made the appointment of counsel in the trial of a non-felony offense a constitutional imperative before a convicted defendant could be imprisoned.

22. 99 S. Ct. at 1161. The term "serious offense" has acquired a technical significance derived from its use as a limitation on the right to jury trial. That right accrues to an accused who is charged with an offense having an authorized maximum penalty of more than six months imprisonment. *See* Duncan v. Louisiana, 391 U.S. 145, 159 (1968) (the authorized sentence is the measure of the seriousness of the offense, not the actual penalty imposed). Thus, the seriousness of the offense is generally a legislative determination, since it is the legislature's function to specify the maximum authorized penalties for commission of the crime. *See* Baldwin v. New York, 399 U.S. 66, 72-74 (1970). If, however, the penalty has been left within the discretion of the court, such as in criminal contempt, the seriousness of the offense is determined by the sentence actually imposed. *See* Frank v. United States, 395 U.S. 147, 148-49 (1969); Cheff v. Schnackenberg, 384 U.S. 373 (1966).

23. 99 S. Ct. at 1161.

24. *Id.*

25. *Id.*

fenses under state law, an intolerable burden of unpredictable dimension and magnitude would be imposed upon the states. Since decisional law had already departed from the literal meaning of the sixth amendment,[26] the Court concluded that it was proper to consider the ramifications of Scott's proposed expansion of sixth amendment rights. Moreover, the common law right to counsel as it existed prior to the enactment of the sixth amendment did not provide a reliable basis for determining the present limits of the right to appointed counsel, since at common law, a person accused of a felony had less in the way of right to counsel than a person accused of a misdemeanor.[27]

Absent a justification for extending the right to appointed counsel, the Court returned to what it regarded as the central premise of *Argersinger*—that actual imprisonment is a radically severe penalty distinguishable from fines or the mere threat of imprisonment.[28] Thus, the *Scott* majority judged the rule of actual imprisonment to be eminently sound and worth adopting as the line defining the constitutional right to appointment of counsel.[29]

In a concurring opinion,[30] Justice Powell reaffirmed his separate opinion in *Argersinger*,[31] stating that the Constitution did not require the appointment of counsel in all cases where imprisonment is ultimately imposed. He maintained that a "special circumstances"[32] approach

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26. *Id.* This statement apparently refers to the expansion of what originally was a right to employ counsel to the present status as a right to have counsel appointed. *See* note 18 and accompanying text *supra*.

27. 99 S. Ct. at 1161-62. In *Argersinger*, the Court rejected this argument. As viewed by the *Argersinger* Court, the sixth amendment cured this defect by extending the right to counsel to felons without withdrawing the right to counsel in misdemeanor and petty cases:

> The Sixth Amendment thus extended the right to counsel *beyond* its common-law dimensions. But there is nothing in the language of the Amendment, its history, or in the decisions of this Court, to indicate that it was intended to embody a *retraction* of the right in petty offenses wherein the common law previously did require that counsel be provided.

407 U.S. at 30 (emphasis added).

28. 99 S. Ct. at 1162. Although the express concern of the *Argersinger* Court was the imprisonment sanction, this did not necessarily imply that there was no sixth amendment right to appointed counsel where lesser sanctions were concerned. *See* Duke, *The Right to Appointed Counsel: Argersinger and Beyond*, 12 AM. CRIM. L. REV. 601, 607 (1975) [hereinafter cited as Duke].

29. 99 S. Ct. at 1162.

30. *Id.* (Powell, J., concurring).

31. 407 U.S. 25, 44-66 (1972) (Powell, J., concurring).

32. *Id.* at 64-65 (Powell, J., concurring). In *Argersinger*, Justice Powell stated that there were three factors to consider in determining the indigent misdemeanant's right to appointed counsel: (1) the complexity of the offense charged; (2) the probable sentence upon conviction; and (3) the circumstances particular to the case, such as the competency of the accused to present his own defense. Under this formula, the likelihood of imprisonment was not determinative. Counsel would be provided to those indigents who, if con-

should be used to determine the misdemeanant's right to appointed counsel in state courts.[33] He repeated his dissatisfaction with the *Argersinger* rule, since it compelled judges to discard the legislatively authorized penalty of imprisonment on the basis of a pretrial conference between the prosecution and judge. Despite his reservations, Justice Powell joined the opinion of the Court out of respect for stare decisis, and expressed the hope that a more pliant rule would soon be recognized as consistent with due process.[34]

Justice Brennan, joined by Justices Marshall and Stevens, dissented.[35] He first contended that the plain wording of the sixth amendment, as well as prior decisions of the Court, compelled the conclusion that Scott's uncounseled conviction violated the sixth and fourteenth amendments.[36] He noted that in *Gideon v. Wainwright*,[37] the Court had held the sixth amendment right to counsel in felony cases obligatory on the states based on the premise that counsel's assistance was fundamental and essential to a fair trial. By establishing a categorical requirement that counsel be appointed for indigent defendants charged with felonies, *Gideon* abandoned the earlier special circumstances due process analysis of *Betts v. Brady*.[38] The *Gideon* result complemented prior decisions which recognized that the meaningful exercise of procedural and substantive safeguards afforded criminal defendants depended upon having "the guiding hand of counsel."[39] Justice Brennan

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victed, would receive a penalty similar in severity to a brief period of imprisonment. This proposed "special circumstances" rule for misdemeanants resembles the rule applied to felony cases by the Court in Betts v. Brady, 316 U.S. 455 (1942) (appointment of counsel in non-capital state criminal cases required only when not to do so would result in a manifestly unfair trial). The *Betts* rule was ultimately overruled by Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment guarantee of counsel in felony cases is a fundamental right that is obligatory on the states through the fourteenth amendment).

33. 99 S. Ct. at 1163 (Powell, J., concurring). The same criticisms of the "special circumstances" rule which plagued *Betts* would also exist if the rule were applied to misdemeanor cases. Paradoxically, the rule required an unskilled layperson to demonstrate the complexity of his case to the trial judge, then show why he was incompetent to manage his own defense. A further criticism of the rule was its expectation that trial judges could accurately predict whether or not events in the forthcoming trial would necessitate defense counsel. Overall, the lack of a definite standard as to when counsel was required fostered the unequal and haphazard treatment of indigent defendants. *See* Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211; Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 709-10 (1968) [hereinafter cited as Junker]. *See also* Duke, *supra* note 28, at 609-12.

34. 99 S. Ct. at 1162-63 (Powell, J., concurring).

35. *Id.* at 1163 (Brennan, J., dissenting).

36. *Id.*

37. 372 U.S. 335 (1963). *See* note 21 *supra*.

38. 316 U.S. 455 (1942). *See* notes 21 & 32 *supra*.

39. 99 S. Ct. at 1164 & nn.2 & 3 (Brennan, J., dissenting).

claimed that even though *Gideon* involved a felony, its reasoning extended to "all criminal prosecutions." He noted that the fair trial rationale of *Argersinger*, like that of *Gideon*, suggested the eventual application of the sixth amendment right to counsel to all state criminal proceedings.[40] As a cautious step in this logical progression, *Argersinger* held only that an indigent defendant is entitled to appointed counsel, even in petty offenses punishable by six months or less imprisonment, if it is likely that he will be incarcerated if convicted. The question of the unimprisoned misdemeanant's right to counsel had been explicitly reserved by the *Argersinger* Court.[41]

Justice Brennan then maintained that Scott could prevail even if the right to counsel were not extended beyond what was assumed to exist in *Argersinger*, as neither party in that case questioned the right of the accused to counsel in trials of non-petty offenses punishable by more than six months in jail.[42] Because Scott had not been charged with a "petty" crime, but one punishable by a maximum sentence of one year imprisonment, his right to appointed counsel was mandated by the logic of *Argersinger*.[43]

Returning to *Argersinger*, Justice Brennan contended that the sole question presented there had been whether the right to appointed counsel applied to those petty offenses to which the right to jury trial did not extend. In finding that the right did apply where imprisonment resulted, the *Argersinger* Court reasoned that the right to counsel was more fundamentally related to a fair trial than was the jury trial right, and that the historical limitation to serious offenses particular to the jury trial right had no relevance in determining when the right to counsel existed. Justice Brennan argued that the rationale of *Argersinger* belied the majority's adoption of a standard for the right to counsel more restrictive than the standard for granting the right to jury trial.[44] He maintained that *Argersinger*, properly interpreted,

40. *Id.* at 1164-65 (Brennan, J., dissenting).

41. *Id.* at 1165 & n.8 (Brennan, J., dissenting).

42. *Id.* at 1165 & n.9 (Brennan, J., dissenting). *See* L. HERMAN, THE RIGHT TO COUNSEL IN MISDEMEANOR COURT 11-12 (1973) [hereinafter cited as HERMAN].

43. 99 S. Ct. at 1165 (Brennan, J., dissenting).

44. *Id.* at 1165-66. Justice Brennan referred to the following statement made by Justice Powell in *Argersinger*:

> It is clear that wherever the right-to-counsel line is drawn, it must be drawn so that an indigent has a right to appointed counsel in all cases in which there is a due process right to a jury trial. An unskilled layman may be able to defend himself in a nonjury trial before a judge experienced in piecing together unassembled facts, but before a jury the guiding hand of counsel is needed to marshall the evidence into a coherent whole consistent with the best case on behalf of the defendant. If there is no accompanying right to counsel, the right to trial by jury becomes meaningless.

407 U.S. at 45-46 (Powell, J., concurring). *But see id.* at 42 (Burger, C.J., concurring), for an opinion to the contrary.

established a "two dimensional" test for the right to appointed counsel, so that the right attached to any non-petty offense punishable by more than six months imprisonment and to any petty offense where actual incarceration was likely regardless of the maximum authorized penalty.[45]

Finally, Justice Brennan criticized the majority's adoption of the actual imprisonment standard to determine the misdemeanant's right to counsel.[46] The intolerable aspect of this method, he claimed, is that it denies counsel to those defendants who are constitutionally entitled to trial by jury. Justice Brennan insisted that the problems inherent in the application of the actual imprisonment standard demonstrated the superiority of the authorized imprisonment standard.[47] He postulated that the authorized imprisonment standard would more faithfully implement the principles of *Gideon*. Since the imprisonment sanction is particularly associated with criminal offenses, the trial of an imprisonable offense possesses the characteristics of a criminal prosecution found by *Gideon* to require the appointment of counsel.[48] The authorized penalty also more accurately predicted the stigma and other collateral consequences of conviction;[49] and excepting *Argersinger*, authorized penalties had consistently guided the Court as the true measures of the seriousness of offenses.[50]

As further proof of the superiority of the authorized imprisonment test, Justice Brennan pointed out that it created no problems of ad-

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45. 99 S. Ct. at 1165-66 (Brennan, J., dissenting). Not only was Scott's misdemeanor-theft a non-petty offense because it was punishable by a sentence of up to one year in jail, but it also carried a clear moral stigma and was professionally prosecuted. *Id.* at 1166. *See also* Duke, *supra* note 28, at 604-09.

46. 99 S. Ct. at 1166 (Brennan, J., dissenting).

47. *Id.* The authorized imprisonment standard would require the appointment of counsel for all indigents accused of a crime having a statutory penalty of imprisonment for any length of time. To reduce the economic and personnel demands imposed by this standard, certain offenses for which imprisonment is authorized could be regarded as "quasi-criminal." Public welfare and regulatory offenses, such as housing code violations and minor traffic violations, would not be treated as within the purview of the sixth amendment according to the proponents of the authorized imprisonment standard. *See* S. KRANTZ, C. SMITH, D. ROSSMAN, P. FROYD & J. HOFFMAN, RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN 119-50 (1976) [hereinafter cited as RIGHT TO COUNSEL IN CRIMINAL CASES]; Rossman, *The Scope of the Sixth Amendment: Who is a Criminal Defendant?*, 12 AM. CRIM. L. REV. 633 (1975); Brief for Petitioner at 16, 37-40.

48. 99 S. Ct. at 1166-67 (Brennan, J., dissenting).

49. *Id.* at 1167. *See also* Note, *Argersinger v. Hamlin and the Collateral Use of Prior Misdemeanor Convictions of Indigents Unrepresented by Counsel at Trial*, 35 OHIO ST. L.J. 168 (1974) [hereinafter cited as *Collateral Use*], where the author discusses the constitutional problems raised by the use of prior convictions for collateral purposes when the prior conviction was obtained without the benefit of counsel.

50. 99 S. Ct. at 1167 (Brennan, J., dissenting). *See* note 22 *supra*.

ministration since, unlike the actual imprisonment standard, it did not require a case-by-case pretrial determination of the probable sentence upon conviction.[51] The authorized imprisonment test thus avoided the equal protection and due process problems inherent in the predictive evaluation method.[52] Finally, the authorized imprisonment standard merited adoption because it respected the legislative judgment of the crime's gravity.[53] Under it, the trial judge retained the permissible sanction of imprisonment until after disclosure of the legal and factual issues at trial.

Justice Brennan concluded his dissent by remarking that the majority had improperly relied upon alleged economic burdens to the states in adopting the actual imprisonment standard, concerns which were irrelevant and speculative.[54] Citing previous decisions based upon the equal protection clause,[55] he objected to the balancing by the Court of the rights of the accused against the state's interest in its pocketbook. Even if economic burdens were a proper consideration, they were not present here, as several states had already adopted the practice of providing counsel in all cases where imprisonment was authorized, and had done so without producing the dire results predicted by the majority.[56] In summation, Justice Brennan characterized the majority decision as having capsized the reasoning of *Argersinger*. By restricting the right to counsel more narrowly that the admittedly less fundamental right to jury trial, the Court had, in his opinion, made "an abrupt break with its own well-considered precedents."[57]

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51. 99 S. Ct. at 1167 (Brennan, J., dissenting). With this method, the trial judge and the prosecution confer on the likelihood of imprisoning the accused if he is convicted. In part, this decision is based upon the strength of the evidence against the accused. Thus, before trial, the judge will have a biased view of the evidence and his decision regarding the need for defense counsel will be influenced by the suggestive information supplied to him by the prosecution. *See* RIGHT TO COUNSEL IN CRIMINAL CASES, *supra* note 47, at 69-117; Duke, *supra* note 28, at 610-12; Junker, *supra* note 33, at 709-10. These various commentators criticize the pretrial predictive evaluation method for its probable due process and equal protection violations.

52. 99 S. Ct. at 1167 (Brennan, J., dissenting). As noted by Justice Brennan, these potential equal protection and due process problems were initially suggested by Justice Powell in *Argersinger*. *See* 407 U.S. at 52-55 (Powell, J., concurring). *See also* note 51 *supra*.

53. 99 S. Ct. at 1167 (Brennan, J., dissenting).

54. *Id.* at 1167-68 (Brennan, J., dissenting).

55. *Id.* at 1168 & n.15 (Brennan, J., dissenting). *See* Bounds v. Smith, 430 U.S. 817 (1977); Mayer v. City of Chicago, 404 U.S. 189 (1971); Griffin v. Illinois, 351 U.S. 12 (1956).

56. 99 S. Ct. at 1168 & n.18 (Brennan, J., dissenting). Justice Brennan further argued that state legislatures could eliminate any undue expenses caused by the authorized penalty standard by culling from the body of imprisonable offenses those which are not truly criminal in nature. In his opinion, this reform was long overdue. *Id.* at 1170.

57. *Id.* at 1170. Justice Brennan compared *Scott* to Justice Black's description of *Betts v. Brady* as "an anachronism when handed down." *See* Gideon v. Wainwright, 372 U.S. at 345.

In a separate dissent, Justice Blackmun stated that the right to counsel secured by the sixth and fourteenth amendments extended at least as far as the right to jury trial secured by those amendments.[58] Therefore, an indigent defendant in a state criminal case must be afforded counsel when prosecuted for a non-petty offense, as well as whenever the defendant is actually subjected to imprisonment upon conviction.[59] Using this two-fold analysis, Justice Blackmun concluded that Scott's conviction should be reversed since he was convicted of an offense for which he was constitutionally entitled to a jury trial.[60]

The class of defendants for whom the Constitution requires the appointment of counsel in state criminal proceedings has expanded to include defendants in capital cases;[61] defendants whose personal circumstances established them as incapable of conducting an adequate defense;[62] felony defendants[63] and defendants charged with misdemeanors carrying a two year authorized penalty of imprisonment;[64] and misdemeanants who are actually imprisoned.[65] But the groundwork for these decisions is divided. The extensions to capital defendants in *Powell v. Alabama*[66] and to felony defendants in *Gideon v. Wainwright*[67] were based on a fundamental moral perception—that fairness to individuals is a supreme value which warrants restraining government in its disciplinary pursuits.[68] This purist viewpoint was compro-

58. 99 S. Ct. at 1170 (Blackmun, J., dissenting).

59. *Id.* at 1170-71 (Blackmun, J., dissenting).

60. *Id.* at 1171 (Blackmun, J., dissenting).

61. Powell v. Alabama, 287 U.S. 45 (1932). *See* note 20 and accompanying text *supra.*

62. Betts v. Brady, 316 U.S. 455 (1942). *See* notes 21 and 33 *supra. See* notes 69-72 and accompanying text *infra.*

63. Gideon v. Wainwright, 372 U.S. 335 (1963). The *Gideon* Court characterized the right to appointed counsel as a fundamental right which was essential to a fair trial. The sixth amendment right to counsel was, therefore, made obligatory on the states through the due process clause of the fourteenth amendment. Although the *Gideon* Court spoke in elaborate terms about the important role defense counsel played in obtaining a fair trial for a defendant, the holding was subsequently construed as limited in application to felonies. *See* Mempa v. Rhay, 389 U.S. 128, 134 (1967).

64. The two year rule derives from Patterson v. Warden, 372 U.S. 776 (1963) (per curiam), where the defendant was convicted of an offense labeled as a misdemeanor under state law, but which carried a two year maximum term of imprisonment. The Supreme Court vacated the judgment and remanded the case "for further consideration in light of [*Gideon*]." *Id.* Thus, the states cannot avoid the rule of *Gideon* by attaching a felony-length imprisonment penalty to crimes bearing the name of "misdemeanor." *See* RIGHT TO COUNSEL IN CRIMINAL CASES, *supra* note 47, at 128.

65. Argersinger v. Hamlin, 407 U.S. 25 (1972). *See* note 5 *supra. See also* notes 80-85 and accompanying text *infra.*

66. 287 U.S. 45 (1932). *See* note 61 *supra.*

67. 372 U.S. 335 (1963). *See* note 63 *supra.*

68. Gideon v. Wainwright, 372 U.S. at 343-45; Powell v. Alabama, 287 U.S. at 68-69.

mised by the special circumstances rule fashioned by the Court in *Betts v. Brady* on the basis of pragmatic concerns.[69] The *Betts* Court considered it unwise to force the states into accepting a single mold of criminal procedure patterned after the federal rule of providing counsel to all indigent criminal defendants.[70] This deviation from principle was justified by the notion that neither the state law enforcement systems nor the professional bar was equipped to handle a universal requirement of counsel in serious criminal cases. It was also believed that such a requirement would be so onerous that the states would largely circumvent it anyway.[71] Therefore, the right to counsel in noncapital cases was pinioned by the *Betts* Court on an empirical showing that as the result of overreaching by the state's prosecutorial powers, made possible by the absence of defense counsel, the individual defendant had been denied due process. In *Gideon v. Wainwright*, this analysis was rejected as unprincipled because the defendant's right to counsel was dependent upon a judge's discretion as to when counsel was necessary to ensure a fair trial, rather than upon an objective standard of fairness.[72] The last extension of the right to counsel to imprisoned misdemeanants is a hybrid of these two decisional sources. Although the *Argersinger* Court based its extension on the fair trial rationale of *Gideon*,[73] the politic Court in *Scott* elevated the state interest in the prompt and vigorous administration of the criminal law to dispositive significance and refused to recognize the applicability of the fair trial principle beyond *Argersinger*'s limits.[74]

Insofar as the decisions extending the right to appointed counsel did so on the basis of the fair trial principle, they premised the necessity of counsel to a fair trial on the pervasive importance of counsel's defensive role in the adversary criminal trial process. The adversary criminal system established in this country contrasts with the early English system of judicial administration, which was designed to assure the Crown of procedural advantages in order to defeat the disorder and lawlessness threatening its security.[75] The sixth amendment, however, was designed to protect criminal defendants from government's oppressive use of its power in procuring the enforcement of its

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69. Betts v. Brady, 316 U.S. at 473. *See* HERMAN, *supra* note 42, at 5-6; A. LEWIS, GIDEON'S TRUMPET 221 (1964) [hereinafter cited as LEWIS].

70. *See* Johnson v. Zerbst, 304 U.S. 458 (1938) (counsel must be appointed in all federal cases where the defendant is unable to procure the services of an attorney).

71. *See* HERMAN, *supra* note 42, at 5-6; LEWIS, *supra* note 69, at 221.

72. 372 U.S. at 345. *See* LEWIS, *supra* note 69, at 220.

73. 407 U.S. at 31-37.

74. 99 S. Ct. at 1162.

75. *See* F. HELLER, THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES 9-12 (1951) [hereinafter cited as HELLER]. *See also* BEANEY, *supra* note 18, at 8-14.

laws.[76] Fundamental to cases involving the right to counsel is the recognition that the adversary process, being essentially coercive, requires the presence of counsel to achieve a parity between the state and the individual.[77] Because the criminal process is governed by the esoteric and difficult science of law, it is unlikely that even a well-educated layperson will have the adequate skill to combat the complex forces bent on establishing his guilt and securing his punishment. Thus, the right to appointed counsel became broader in scope, albeit in a staggered fashion, because of the belief that a judgment acquired through the mere artlessness of the defendant was repugnant to the concept of justice.

If it is true that a just adjudication cannot be had without the presence of counsel, the inescapable conclusion which follows is that the right to counsel's aid at trial should be an absolute right. Were the question of full extension of the right to appointed counsel to be resolved purely from this conceptual standpoint, the answer should have been obvious from the logical implications of the *Powell* opinion, or at the latest, from the *Gideon* opinion.[78] However, the Supreme Court has been loathe to force upon the states the burden of implementing a full right to appointed counsel, and this concern of federalism accounts for the piecemeal progression of the right.[79] Since *Scott* interprets *Argersinger*'s actual imprisonment rule as the final stage in the development of the right to appointed counsel, the former concern that a defendant would be unfairly tried and convicted has transmogrified into a concern that a defendant would be incarcerated as the result of an unfair trial. Yet the *Argersinger* Court was heavily influenced by the abuses of the misdemeanor trial process[80] where, for example, the guilt of the defendant is generally assumed, prejudice reigns, the defendant's rights are ridiculed, and the judges too frequently demean and malign the defendant and the witnesses.[81] As a result, the *Argersinger* Court rejected the argument that the assistance of counsel was not necessary to ensure that defendants accused of misdemeanors and petty crimes receive a fair trial.[82] But the *Argersinger* Court did not create an affir-

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76. *See* HELLER, *supra* note 75, at 13-34.

77. *See* text accompanying note 68 *supra*.

78. *See* notes 66-68 and accompanying text *supra*. *See generally* HERMAN, note 42 *supra*.

79. *See* HERMAN, *supra* note 42, at 59-72, 84-86.

80. 407 U.S. at 34-36.

81. *See generally* L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES (1977); Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 26 (1973). *See also* HERMAN, *supra* note 42, at 11-30.

82. 407 U.S. at 36 (citing AMERICAN CIVIL LIBERTIES UNION, LEGAL COUNSEL FOR MISDEMEANANTS, PRELIMINARY REPORT 1 (1970)) ("misdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are

mative right to appointed counsel in misdemeanor cases; it merely prohibited the trial judge from imposing a sentence of imprisonment upon an uncounseled misdemeanor defendant.[83] The effect of this no confinement rule was to skew the perspective of the earlier sixth amendment cases by focusing only on the penalty aspect of the trial.[84] Both *Powell* and *Gideon* invalidated the conviction of an uncounseled defendant in capital and felony cases, respectively. Although the *Argersinger* Court made no explicit statement validating the uncounseled conviction of an unimprisoned misdemeanant, the opinion was susceptible to this reading and various lower courts upheld the constitutionality of convictions

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defendants who face similar charges without counsel"). The *Argersinger* Court also found that, with one exception, the application to the states of sixth amendment rights had not been limited on the basis that the offense charged was not serious. *Cf.* Henderson v. Morgan, 426 U.S. 637 (1976) (right to be informed of the nature and cause of the accusation); Groppi v. Wisconsin, 400 U.S. 505 (1971) (right to an impartial jury); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process of witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to a speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (right to confrontation); *In re* Oliver, 333 U.S. 257 (1948) (right to a public trial). The single instance where the Court has limited an enumerated sixth amendment right on the basis of the seriousness of the offense concerned the right to trial by jury. *See* Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968).

83. This has been described as the "negative" right to counsel, since it affords the indigent misdemeanant the "right" not to go to jail unless counsel had been appointed or properly waived. *See Collateral Use, supra* note 49, at 169-70.

84. The *Argersinger* Court refused to distinguish between serious and non-serious offenses in defining the scope of the right to counsel because there was no support for qualifying the sixth amendment language, which clearly states that "in all criminal prosecutions" the enumerated rights shall apply. *See* note 27 *supra*. Despite this reasoning, the *Argersinger* Court compromised the plain meaning of these words by using an imprisonment/non-imprisonment dichotomy, which is no more principled than the serious/non-serious offense dichotomy rejected by the Court. *See* HERMAN, *supra* note 42, at 83. An analogy can be drawn, however, between the fragmentation of the sixth amendment's meaning for the rights to jury trial and counsel. The serious offense limitation of the jury trial right derives from an historical reason rather than from textual analysis, and in the case of this right, the meaning of the "criminal prosecutions" language has been varied on grounds extrinsic to the text of the amendment. *See* Duncan v. Louisiana, 391 U.S. 145 (1968). The Court's analysis in *Scott* provided a justification founded upon administrative considerations which allow the words "all criminal prosecutions" to mean something less than what they seem to mean when speaking of the right to counsel. *See* notes 24-26 and accompanying text *supra*. The practical problems which would beset a complete extension of the right to appointed counsel are comparable to the historical considerations which influenced the *Duncan* Court to place limits upon the jury trial right. Just as the right to jury trial is limited to non-petty offenses although no such restriction appears in the text of the amendment, so too the right to appointed counsel is now limited to cases involving actual imprisonment, although no distinction between imprisonment and non-imprisonment is present in the text of the amendment itself. However, not all authorities equate the impact of economic concerns on the sixth amendment with the impact of historical limits. *See, e.g.*, RIGHT TO COUNSEL IN CRIMINAL CASES, *supra* note 47, at 121-22; Junker, *supra* note 33, at 706-07; *Collateral Use, supra* note 49, at 185 & n.77.

obtained without counsel provided that no imprisonment was imposed.[85]

Scott now upholds the constitutional validity of the uncounseled conviction, much to the chagrin of commentators who viewed this outcome as fraught with illogic.[86] Doubts about the soundness of the no confinement rule stem from the quandry of how an unconstitutional result, imprisonment, can flow from a constitutionally intact proceeding. The *Scott* decision in effect sanctions a sliding scale of due process for misdemeanor trials. In an uncounseled trial, the kind of sentence ultimately imposed now determines whether or not the trial itself reached a constitutionally acceptable level of fairness and veracity of adjudication.[87] If at the end of the trial the defendant is incarcerated, the presence of counsel is retroactively deemed necessary to ensure that the trial was a fair proceeding which resulted in accurate findings. However, if the accused is merely fined, the services of defense counsel are not deemed essential and the requirements of due process are complete.[88]

The apprehensions which militated against a full extension of the right to appointed counsel at the time of *Argersinger* similarly de-

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85. *See, e.g.*, United States v. White, 529 F.2d 1390 (8th Cir. 1976); United States v. Sawaya, 486 F.2d 890 (1st Cir. 1973); Marston v. Oliver, 485 F.2d 705 (4th Cir. 1973); Sweeten v. Sneddon, 463 F.2d 713 (10th Cir. 1972). *Contra*, Potts v. Estelle, 529 F.2d 450 (5th Cir. 1976); Thomas v. Savage, 513 F.2d 536 (5th Cir. 1975); James v. Headley, 410 F.2d 325 (5th Cir. 1969); Morgan v. State, 235 Ga. 632, 221 S.E.2d 47 (1975); *Ex parte* Burt, 499 S.W.2d 109 (Tex. Crim. App. 1973); State *ex rel.* Winnie v. Harris, 75 Wis.2d 547, 249 N.W.2d 791 (1977).

86. *See, e.g.*, HERMAN, note 42 *supra*; Duke, note 28 *supra*; Junker, note 33 *supra*; *Collateral Use, supra* note 49, at 173-75, 188-89.

87. *See Collateral Use, supra* note 49, at 173-75.

88. After *Scott*, a prominent question is what collateral civil and criminal consequences can be based upon uncounseled convictions. Since *Scott* upholds the uncounseled conviction, it can be used to support the direct and collateral imposition of less drastic consequences such as fine, stigma, probation, loss of employment, and revocation of licenses. However, more serious constitutional problems are raised when an uncounseled conviction is used collaterally as the basis for imprisonment. For example, under a penalty enhancement scheme or recidivist statute, an uncounseled prior conviction could influence the sentencing portion of a later counseled conviction so that imprisonment would result. The uncounseled conviction could also be considered in a subsequent proceeding to revoke parole, probation or a suspended sentence. Although the Supreme Court has not ruled on permissible collateral uses of uncounseled convictions, *Argersinger* implies that subsequent imprisonment is prohibited since no uncounseled conviction may "end up in the actual deprivation of a person's liberty." 407 U.S. at 40. *See also* Burgett v. Texas, 389 U.S. 109, 115 (1967) (felony convictions obtained in violation of the *Gideon* rule cannot be used to support or enhance punishment for another offense). *See generally Collateral Use*, note 49 *supra*. The Supreme Court recently granted certiorari to decide this issue in Baldasar v. Illinois, 52 Ill. App. 3d 305, 367 N.E.2d 459 (1977), *cert. granted*, 99 S. Ct. 1495 (1979) (No. 77-6219) (issue is whether prior uncounseled misdemeanor conviction can be considered so as to elevate a subsequent misdemeanor offense to felony status, thereby augmenting the possible penalty upon conviction).

terred the *Scott* Court from progressing beyond the no confinement rule. On neither occasion did the Court question the constitutional relevance of the administrative burdens which a full extension of the right to appointed counsel might place upon state courts.[89] The Court willingly accepted the notion that an absolute extension of the right to counsel would impose an undue burden on the states, despite the lack of any accurate figures on the potential misdemeanor caseload, the number of non-felony indigent defendants, or the current availability of and prospective need for defense attorneys.[90] Furthermore, in *Scott* and *Argersinger*, the Court accepted the propriety of compromising individual rights on the basis of the maladministration of case disposition and the unselectivity of case intake which are at least partly responsible for the clogged misdemeanor court system.[91] The failure of the Court to insist upon radical reform in the misdemeanor system has allowed the states to bootstrap themselves into denying the right to counsel to unimprisoned indigent misdemeanants because of the states' own poor allocation of judicial and prosecutorial resources.[92]

The *Scott* Court was also influenced by seven years of experience in implementing the no confinement rule.[93] In *Argersinger*, the Court attempted to stimulate adversariness in the misdemeanor process by providing counsel to imprisoned indigent misdemeanants.[94] Ideally, defense counsel's purpose is to demand the scrupulous treatment of his client by the criminal justice system, to ensure that the whole of his case is dissected into separately analyzable parts for exposition at trial, and essentially, to be a gadfly to the prosecution.[95] Ironically, various studies relied upon by the *Scott* Court demonstrated that no discernible adversary spirit had been fostered by the *Argersinger* rule that counsel be appointed whenever imprisonment upon conviction was a realistic possibility.[96] An obsession for the speedy and frugal dispos-

89. *But see* text accompanying notes 54-56 *supra*.

90. *See* HERMAN, *supra* note 42, at 59-72; RIGHT TO COUNSEL IN CRIMINAL CASES, *supra* note 47, at 9-18.

91. *See* HERMAN, *supra* note 42, at 65.

92. *Id.*

93. 99 S. Ct. at 1162 & n.5.

94. 407 U.S. at 36-37.

95. *See* Ingraham, *The Impact of Argersinger—One Year Later*, 8 L. & SOC'Y REV. 615, 635-36 (1974) [hereinafter cited as Ingraham].

96. 99 S. Ct. at 1162 n.5. *See* RIGHT TO COUNSEL IN CRIMINAL CASES, *supra* note 47, at 4-5, where the authors state:

> Certain general findings that have emerged from this and other studies can be summarized as follows:
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> —Although most jurisdictions have begun to appoint counsel in non-felony cases where imprisonment may be imposed (some jurisdictions, in fact, had done so even before *Argersinger*) compliance has been generally token in nature. What this means is that: (a) waiver of counsel remains common and is often openly encouraged

ing of cases, regardless of the fairness or truth of the result, still prevailed. A conciliatory rather than contestual relationship between opposing counsel remained the norm. In most cases, a guilty plea and diminished sentence were agreed upon out of court after private negotiations between prosecuting and defending counsel, both of whom usually regarded the misdemeanor case as a relatively insignificant item on their busy schedules.[97] Thus, simply mandating that lawyers represent indigent misdemeanants did little to rectify the habitual negligence of the misdemeanor court, and according to some observers, even intensified its assembly-line atmosphere.[98] These results demonstrate the natural resistance which a theory of justice may encounter when competing against a solidly entrenched organization of criminal administration.[99] But even more importantly, these results undermined the belief that the fair trial principle could be applied to misdemeanor cases. Because the basic policies underlying the *Argersinger* extension were not effectuated by compliance with its mandate, the *Scott* Court perceived that nothing would be accomplished by extending the right to counsel beyond the requirements of *Argersinger*.

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by judges; (b) indigency standards nationally are disparate and irrational and have not been uniformly applied; (c) appointed counsel is often inexperienced or of limited competence; (d) counsel often is appointed just before or at trial; (e) counsel often is not adequately prepared to represent his client's best interest; (f) limited concern with basic procedural fairness continues to be prevalent in lower criminal courts; and (g) relatively little attention is given to the dispositional needs of defendants.

97. *See, e.g.*, Ingraham, note 95 *supra*, where the author explains that:

[D]efense counsel, be he appointed private counsel or public defender, is a member of a system which has systemic needs and demands which it enforces on its members through various forms of subtle, and not so subtle, pressures and sanctions. It may be presumed that in most cases defense lawyers desire to protect their clients, but the pressures imposed upon them by their own busy schedules and by the courts demanding the speedy disposition of cases may be sufficient to override a full-hearted commitment to exercise every fair and legal device at their disposal to improve the position of their clients.

Id. at 638 (footnote omitted). *See also* Blumberg, *Covert Contingencies in the Right to Assistance of Counsel*, 20 VAND. L. REV. 581 (1967); Junker, *supra* note 33, at 697-703; Packer, *Two Models of the Criminal Process*, 133 U. PA. L. REV. 1 (1964).

98. *See, e.g.*, Ingraham, note 95 *supra*, where the author reports:

All of these findings are consistent with the hypothesis that the effect of *Argersinger* has not been to increase the amount of adversariness within the system but merely to increase the need for defense attorneys to process the defendant through the system in an expeditious way. Thus, *Argersinger* may have the effect of delaying the proceedings, of increasing the legal costs of such proceedings, and of routinizing procedures for handling misdemeanor cases, but it does not appear that it is having much effect in changing the nature of the process from one of negotiation to one of adjudication.

Id. at 634-35. *See also* RIGHT TO COUNSEL IN CRIMINAL CASES, *supra* note 47, at 3-7.

99. *See* Ingraham, *supra* note 95, at 637-38.

However, the basic assumption of the fair trial principle is that the presence of counsel serves to protect the defendant from the characteristic abuses of the misdemeanor court, including those that fall short of an unfair loss of liberty.[100] It may be that counsel's presence will not guarantee the misdemeanor defendant fairness in every aspect of his trial; and that, apart from preserving the option of imprisoning counseled misdemeanants, the appointing of counsel has only a slight effect upon the manner in which misdemeanor defendants are treated. If, indeed, the counseled defendant is in substantially the same predicament as the uncounseled defendant in terms of obtaining a trial which is for the most part fair, then it is tempting to conclude that the assistance of counsel is not essential to obtaining one. This conclusion, however, confuses the right to representation with the effectiveness of representation.

The concern over the effectiveness of representation may explain the *Scott* Court's focusing upon the penalty aspect of the misdemeanor trial, since presumably the Court sought to provide a benefit to uncounseled misdemeanor defendants commensurate with that of appointing counsel. Since the observable effect of affording counsel to the misdemeanant is generally a sentence reduction,[101] the Court gave to uncounseled indigents what it perceived as the equivalent: removal of the penalty of imprisonment. By eliminating the imprisonment sanction, the Court provided uncounseled misdemeanants with the manifest practical benefit of counsel. Apparently the Court considered the use of the predictive evaluation as a surrogate plea bargain advantageous because it was not necessary to hire another person to do what the prosecutor and judge could do themselves.[102]

The array of functions performed by the lawyer for a criminal defendant, however, is not reducible to a simple prohibition on imprisoning the unrepresented misdemeanant. To do so minimizes the vital role counsel plays in other areas, such as pretrial release and bond-setting, attacking the constitutionality of laws and law enforcement techniques, determining the sufficiency of the charge, presenting and suppressing evidence, selecting and examining witnesses, raising protective motions, and ensuring the meaningful exercise of the other

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100. *See* notes 80 & 81 *supra.*

101. *See* HERMAN, *supra* note 42, at 24; RIGHT TO COUNSEL IN CRIMINAL CASES, *supra* note 47, at 218-20; Ingraham, *supra* note 95, at 634-38. *See also* Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1397-98 (1970), where it is suggested that plea bargaining methods thwart the basic values sought to be preserved by the criminal trial process.

102. *But see* Powell v. Alabama, 287 U.S. at 61, where the Court denied that a trial judge could fairly represent the interests of the defendant while concurrently performing his duties on the bench.

sixth amendment rights.[103] Some observers of the misdemeanor system insist that reform will not occur until enough lawyers populate its courtrooms and publicize its abuses.[104] Moreover, while many lawyers do not regard the misdemeanor defendant with the depth of concern usually reserved for defendants charged with felony and capital crimes, the fact remains that even the perfunctory lawyer will understand and invoke legal procedures more competently than will an uncounseled misdemeanor defendant.[105]

In view of this, the right to counsel, which has often been described as the most pervasive right,[106] is paradoxically less broad in scope than the other sixth amendment rights.[107] For example, the defendant has the right to jury trial if charged with an offense carrying a maximum authorized confinement in excess of six months.[108] In certain situations, however, *Scott* will deny the right to counsel to indigent misdemeanants who have an absolute right to a jury trial. The absence of counsel in most of these cases will result in the unwitting release of the jury trial right by an intimidated defendant[109] or the appointment of counsel by a conscientious judge once the defendant exercises his right to a jury trial. But there will be situations where an uncounseled misde-

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103. *See* HERMAN, *supra* note 42, at 16-30.
104. *Id.* at 28-29.
105. *Id.* at 20.
106. *Id.* at 68.
107. *See* text accompanying note 57 *supra.*
108. *See* note 22 *supra.*
109. The following excerpt from the Report of the Trial Proceedings for Scott's misdemeanor-theft conviction illustrates the modern-day adage that an uncounseled misdemeanant and his rights are soon parted:

The Court: Who are you?
Mr. Scott: Scott.
The Court: You are charged with the offense of theft.
Mr. Scott: Well, your Honor, that isn't true.
The Court: I said you are charged with it. My next inquiry is are you going to be ready for trial?
Mr. Scott: Am I ready?
The Court: Yes.
Mr. Scott: I am ready for trial.
The Court: Is the state ready?
Mr. Grossman: State is ready.
The Court: Arraign the defendant, please.
The Clerk: You are charged with the offense of theft. Are you ready for trial?
Mr. Scott: Yes, I am.
The Clerk: How do you plead to the charges?
Mr. Scott: Not guilty.
The Clerk: Do you want to be tried by this Court or before a jury?
Mr. Scott: Well, it doesn't matter. Right here will be okay with me.

Appendix to Petitioner's Brief for Certiorari at 22a, Scott v. Illinois, 99 S. Ct. 1158 (1979).

meanant demands a jury trial despite his incompetence to discern the law and marshall the evidence for the contemplation of his peers. If the purpose of the decision to give the defendant the right to a jury trial in serious cases was to provide him with a "defense against arbitrary law enforcement,"[110] its meaning has been nullified by *Scott*'s refusal to give the defendant the right to counsel.

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110. As stated in Duncan v. Louisiana, 391 U.S. 145, 156 (1968):
Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.